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In the Supreme Court of the United States

OCTOBER TERM, 1979

THOMAS BENNETT DRIVER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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The opinion of the court of appeals (Pet. App. A-1 to A-2) is not reported. The opinions and orders of the district court (Pet. App. A-3 to A-49) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1979. A petition for rehearing was denied on September 13, 1979. The petition for a writ of certiorari was filed on October 11, 1979. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court correctly found that petitioner Driver's consent to the search of his business premises was voluntary.

2. Whether the warrantless search of petitioner Reece's automobile was proper.

3. Whether the evidence was sufficient to convict petitioners Reece and Driver of receipt and concealment of a stolen automobile.

4. Whether evidence showing that certain stolen automobiles were located on petitioner Brown's property was admissible as independent of other evidence that had been illegally seized from Brown.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioners were convicted on one count of conspiracy and several substantive counts of receiving and concealing stolen motor vehicles, in violation of 18 U.S.C. 2313, 371 and 2. Petitioner Driver was convicted on the conspiracy count and four substantive counts and was sentenced to concurrent terms of three years' imprisonment on each count (C.A. App. 3A). Petitioner Brown was convicted of the conspiracy count and six substantive counts; she received a prison term of two years, to be followed by three years' probation, and was fined $2,000 (C.A. App. 6A).

Petitioner Reece was convicted of the conspiracy count and one substantive count and was sentenced to a year and a day in prison, to be followed by five years' probation (C.A. App. 9A).[1] The court of appeals affirmed (Pet. App. A-1 to A-2).

The evidence adduced at trial established that petitioners were part of a large scale auto theft scheme in which stolen automobiles were disassembled and either sold in parts or reassembled so as to alter the appearance of the vehicles. As part of the scheme, petitioner Driver, a junkyard owner, legitimately obtained junked automobiles in order to assemble stolen parts on their frames. Through his salvage operation, Driver was also able to acquire new vehicle identification numbers (VINs) to place on reassembled or stolen automobiles. The stolen frames were generally cut into sections and sold for scrap (Pet. App. A-1 to A-2).

On July 2, 1976, FBI agents seized certain evidence from petitioner Driver's junkyard after he signed a form consenting to a search (Pet. App. A-24 to A-25). The district court denied a motion to suppress this evidence (Pet. App. A-24 to A-27).

On the same date, FBI agents seized certain property, including vehicles, from the premises of petitioner Brown, an employee of Driver's, and other evidence from a locked outbuilding on those premises (Pet. App. A-18). The evidence at trial showed that the vehicles were stolen. The search of the premises

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[1] Another co-defendant, William P. Tolbert, was convicted of conspiracy but is not a petitioner in this case.

took place after petitioner Brown's attorney informed the agents that they could go ahead (Pet. App. A-19). The search of the outbuilding occurred after Brown gave the key to her attorney to admit the agents (Pet. App. A-23). The district court granted Brown's motion to suppress the evidence seized from the premises on the ground that she did not consent to that search, but it denied the motion to suppress the evidence seized from the outbuilding (Pet. App. A-18 to A-23). Prior to the search, agents had taken photographs of the vehicles on petitioner Brown's premises from an airplane and from across the road (Tr. 249, 260, 272, 287).

On the same date, petitioner Reece drove up to petitioner Driver's junkyard in a red Volkswagen. Evidence at trial showed that this car had been stolen (see pages 8-10, *infra*). A police officer observed the VIN plate that was visible through the windshield and determined that it was not the one that originally came with the car. He then entered the car, lifted the rear seat and observed the VIN on the pan of the car to be different. The car was then seized by the police (Pet. App. A-28 to A-29). Petitioner Reece's motion to suppress the automobile was denied by the district court (Pet. App. A-28 to A-30).

ARGUMENT

1. Petitioner Driver first contends (Pet. 11) that the court erred in denying his motion to suppress certain stolen automobile and truck parts seized dur-

ing the consent search of the junkyard he operated. This claim is without merit.

A pretrial evidentiary hearing was held on petitioner Driver's motion to suppress. The evidence showed that Driver signed a consent form permitting a search of his premises and the seizure of any items the agents desired to take from the premises.[2] While Driver did not read the form before signing it, being almost illiterate, an FBI agent read its contents to him and told him orally that he need not consent to the search (S.H. Tr. 68-74).[3] Thereafter, Driver permitted the agents to search his business premises.

Petitioner Driver suggests (Pet. 6, 11) that the consent was not voluntary under the standards of

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[2] The consent form read as follows:

> I, Thomas Bennett Driver, having been informed of my constitutional rights not to have a search made of the premises hereinafter mentioned without a search warrant, and of my right to refuse to consent to such a search, hereby authorize Sheriff Bobby McCullogh and John D. Jones, Special Agents of the Federal Bureau of Investigation, United States Department of Justice, to conduct a complete search of my premises located at *Driver's Garage and Junkyard, Route 4, Woodbury Highway, Manchester, Tenn.* These agents are authorized by me to take from my premises any letters, papers, materials, or other property which they may desire.
>
> This permission is given by me to the above named Special Agents voluntarily and without threats or promises of any kind.
>
> /s/ Thomas Driver

(Pet. App. A-25).

[3] Transcripts of the suppression hearing are designated "S.H. Tr.". The trial transcripts are designated "Tr.".

Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973), on the grounds that the agents asked whether they could "inventory" the premises rather than "search" it and that the presence of law enforcement officials was otherwise coercive. The trial court specifically found that the consent was "unequivocal, specific, voluntary, and given without actual or implied duress or coercion" (Pet. App. A-26). This finding has ample support in the record. The form that was read to petitioner Driver referred to permission "to conduct a complete search of my premises" and to seize items therefrom. While petitioner Driver may have been illiterate, he was intelligent enough to have operated his junkyard business for many years (S.H. Tr. 7). Furthermore, there is no evidence in the record that the FBI agent or the local sheriff attempted in any way to coerce petitioner Driver into signing the form. In fact, after signing the form, Driver asked that the search be delayed until he could consult with his attorney. The search did not commence until after the attorney had arrived on the scene, consulted with Driver, and then stated to the agent that he could go ahead with the search (S.H. Tr. 75-77).

2. Petitioner Reece argues (Pet. 7-8, 11) that the trial court erred in failing to suppress evidence found pursuant to the warrantless search of his car, which was parked outside Driver's junkyard at the time the junkyard was being searched. This contention is without merit.

It is well established that officers may search an automobile without a warrant if they have probable cause to believe that the automobile contains contraband or evidence of criminal activity. *Chambers* v. *Maroney*, 399 U.S. 42 (1969); *Carroll* v. *United States*, 267 U.S. 132 (1925). Here, FBI Agent Joseph M. High and Inspector Donaldson, a local expert on VIN plates (Tr. 106-108), noticed Reece's Volkswagen parked in the driveway of Driver's junkyard and proceeded to look through the windshield at the VIN plate on the dashboard. Inspector Donaldson recognized immediately that the plate was not factory installed. He then entered the Volkswagen, lifted the rear seat and obtained the true VIN from the pan, a part of the automobile directly beneath the rear seat (S.H. Tr. 174, 175, 178; Pet. App. A-29). A computer check of this number revealed that a car bearing the VIN found on the pan had been stolen from a woman in Georgia (S.H. Tr. 175).

As the trial court found (Pet. App. A-29), when Inspector Donaldson noticed that a VIN plate was not the original plate, he had probable cause to believe that the vehicle was stolen.[4] The inherent mobility of the automobile created an exigency that excused the usual warrant requirement. *Chambers* v. *Maroney*, *supra*; *Carroll* v. *United States*, *supra*. Petitioner's reliance on *United States* v. *Chadwick*,

[4] Inspector Donaldson's observation of the VIN plate did not constitute a search because it was in plain view as he stood outside the car. See *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971).

433 U.S. 1 (1977), is misplaced. That case creates no exception to the principle that warrantless probable cause searches of automobiles are lawful.

3. Petitioners Reece and Driver also assert (Pet. 11, 13) that the evidence presented was insufficient to convict them of receipt and concealment of a stolen vehicle (the Volkswagen that was searched). Petitioners attempted to prove at trial that petitioner Reece installed a new pan in his car after an accident (Tr. 431-432) and argue here that mere possession of the stolen pan, only one part out of many in a car, cannot constitute concealment of a "motor vehicle" in violation of 18 U.S.C. 2313. While it is true that the Seventh Circuit has held that one may not be convicted of receiving and concealing a stolen automobile where it is only proven that the defendant possessed a single part of the stolen automobile, *United States* v. *Shanks*, 521 F.2d 83 (1975), the evidence here did demonstrate that the vehicle itself was stolen.

The government presented evidence indicating that a red 1972 Volkswagen, VIN 1122261566, was stolen in December 1975 from a woman in Clarkston, Georgia (Tr. 174). Petitioner Reece's red 1972 Volkswagen that the officers inspected on the day of the search bore a VIN plate on the dashboard with a different number, which Inspector Donaldson determined was not the original plate (Tr. 208). The officers then determined that the number on the pan under the rear seat was VIN 1122261566, the number of the stolen vehicle (Tr. 209). The Volkswagen

engine bore the number AE666025 (Tr. 235). This engine had been placed in a Volkswagen bearing VIN 1122261566 at the time the car was manufactured (Tr. 710).[5] Yet petitioner Reece testified that the engine in his Volkswagen was the original engine (Tr. 442-443). The dashboard VIN plate on Reece's Volkswagen corresponded to the number of another salvaged Volkswagen that petitioner Driver had bought legitimately. Accordingly, the evidence compellingly established that the red Volkswagen examined on the day of the search had been stolen, with

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[5] Petitioners Reece and Driver urge (Pet. 12) that the court improperly admitted the evidence that engine AE666025 was part of a Volkswagen with VIN 1122261566, presumably because it was hearsay. However, it is clear that a record kept in the normal course of business may be introduced into evidence if the party seeking its admission lays a proper foundation indicating its trustworthiness. *United States* v. *Davis*, 568 F.2d 514, 516 (6th Cir. 1978); Rule 803(6), Fed. R. Evid. Here, the information came from an employee of the National Automobile Theft Bureau, who testified that the Bureau kept records of engine numbers in the normal course of business (Tr. 710).

In *Davis*, upon which petitioners mistakenly rely, a policeman's testimony that the VINs he received pursuant to a check with the National Crime Information Center (NCIC) corresponded to the VINs of two stolen vehicles was inadmissible hearsay where the owner's testimony did not describe the vehicles or identify their VINs. That case did not concern the direct introduction into evidence of the report from the NCIC, which the *Davis* court specifically stated would have been admissible. 568 F.2d at 516.

United States v. *Kim*, 595 F.2d 755 (D.C. Cir. 1979), which petitioners also cite, is wholly inapposite to the instant case. It concerns a telex message from a Korean bank that was not kept in the normal course of business and was generally untrustworthy evidence. *Id.* at 760-763.

the dashboard VIN plate taken from another car as a means of concealing the theft, a clear violation of 18 U.S.C. 2313. See *United States* v. *Bishop*, 437 F.2d 97 (6th Cir. 1971) (possession of major parts of a stolen vehicle may be basis for conviction under 18 U.S.C. 2313 where other evidence shows that the whole vehicle was stolen and received before being dismantled).

4. Finally, petitioner Brown contends (Pet. 7-11) that the court erred in permitting the prosecutor to prove that stolen vehicles were located on her property after the district court had suppressed the stolen vehicles themselves as illegally seized. This contention is erroneous.

When evidence is suppressed as the fruit of an illegal search, the facts sought to be proved by that evidence may still be proved by evidence independent of the tainted search. See *Wong Sun* v. *United States*, 371 U.S. 471 (1963). In the present case, the court suppressed five stolen vehicles seized from petitioner Brown's lot. The court also ruled, however, that the search of an outbuilding on her property was lawful (Pet. App. A-23).[6] That search revealed the license plates that came from the five stolen vehicles. At trial, the court properly ruled, over defense objections (Tr. 237-239), that the prosecutor could introduce the unsuppressed license plates, as well as photographs of the automobiles on Brown's property taken from the air and across the

[6] Petitioner Brown does not here contest the court's finding that she consented to the search of the outbuilding.

road prior to the search (Tr. 249, 260, 272, 287). The prosecutor then called to the stand the owners of the vehicles, who identified the respective license plates displayed to them as being those that were on their vehicles at the time they were stolen (Tr. 241, 255, 265-266, 298). Four of them also identified the photographs as resembling their respective automobiles (Tr. 242, 257, 265, 285). This evidence was not a fruit of the illegal search, but was derived independently. Accordingly, it was properly admitted by the court.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] Petitioners also argue (Pet. 12) that petitioner Brown's possession of license plates from stolen vehicles was insufficient to constitute an overt act in furtherance of their conspiracy to conceal stolen autos. This argument is without foundation. The removal and concealment of legitimate license plates makes the accurate determination of an automobile's true owner more difficult and thus does further the charged conspiracy.

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